IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 789 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAFARKHAN JAMKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 789 of 2001
MR PR NANAVATI for Petitioner No. 1
PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 13/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. The appellant in this appeal has challenged the judgment and order dated 2.8.2001 passed in Sessions Case No.52 of 1999 by the learned Addl. Sessions Judge, Kutch-Bhuj convicting him for an offence punishable under section 304 Part II of the IPC and sentencing him to suffer R.I.for ten years and to pay a fine of Rs.5000/-, in default, to undergo further R.I.for two years.

2. The appellant is the original accused no.3 who was charged along with three other accused for the offence punishable under sections 302, 324, 504 read with section 114 of IPC. By the impugned judgment and order, the learned trial judge has not convicted any of the accused for offence punishable under sections 302, 504 read with 114 of IPC. Besides convicting the appellant for offence punishable under section 304 Part II of IPC, he has convicted the original accused no.1 Gafar for an offence punishable under section 324 of IPC and sentenced him to suffer R.I.for one year and to pay a fine of Rs. 500/-, in default, to undergo R.I.for two months. He also convicted original accused no.4 Ramju for offence punishable under section 324 of IPC and sentenced him to suffer R.I.for one year and to pay a fine of Rs. 500/-, in default, to undergo R.I. for two months. As far as original accused no.2 Adam is concerned, he along with accused no.4 were acquitted for offence punishable under section 302 read with section 114 of IPC.

3. The prosecution case as stated by the complainant in his complaint, briefly stated, is as under:

On 19.1.1999, the complainant along with his uncle Sharafkhan (deceased), Jummakhan Gulmamad, PW 2 Ex.10, his brother Suleman alias Salimkhan, PW 4 Ex.12 and his father Fatehkhan, PW 3 Ex.11 had gone to Kadhan Vandh to offer prayer being Id Day from village Makanpur.When they reached near the outskirt of village Dhonsa Vandh at about 9.00 a.m., all the accused were also following them to offer prayer. At that time, the appellant initiated quarrel by abusing the complainant. The quarrel was with respect to not allowing his son Gafur to come to his house and also with respect to the quarrel having taken place with one Mahmadkhan at Bhuj a day previous to the incident. The complainant tried to persuade the accused not to quarrel as it was a day of Id. Instead, the accused no.4 who was armed with a stick, inflicted stick blow on the head of Salim, PW 4. It is further the case of the complainant that when at that time they tried to intervene, the appellant Jafarkhan inflicted knife blow on the abdomen of his

uncle Sharafkhan with the result Sharafkhan died on the spot. It is the case of the complainant that in this scuffle, the accused also sustained injuries. In the complaint, it was stated that as Gafur, the son of the appellant Jafarkhan did not possess good character, he prevented Gafur from coming to his house. It was further stated that there was a scuffle between the complainant and Mahobbatkhan, brother of Gafur, a day previous to the incident and because of this, the accused inflicted stick blow on the head of his brother Salim and the appellant Jafarkhan inflicted knife blow in the abdomen of his uncle Sharafkhan.

4. The complaint lodged by complainant Hayatkhan has been recorded as FIR No.20 of 1999 in Bhuj Taluka Police Station. PSI of Bhuj Taluka Police Station thereafter started usual investigation. After completing investigation, on getting sufficient evidence against the accused, he submitted chargesheet for offence punishable under section 302 of IPC before the learned Judicial Magistrate, First Class, who in turn, committed the case to the Court of Sessions at Bhuj.

5. The accused pleaded not guilty to the charge levelled against them and claimed to be tried. The learned trial judge, after appreciating the evidence on record including the further statement of the accused, accepted the evidence of prosecution witnesses and held that the prosecution has proved that the deceased died homicidal death on 19.1.1999. The learned judge, therefore, convicted them and passed the sentence as stated above.

6. We admitted the appeal on December 21,2001 and issued notice as to bail to the learned APP. In the meantime, we had directed the appellant to supply paper book containing relevant evidence. After hearing the learned Counsel appearing for the appellant and the learned APP and on going through the evidence, prima facie we were in agreement with the reasonings and the ultimate conclusion arrived at by the learned trial judge except on the sentence part. In the circumstances, with the consent of learned Counsel appearing for the parties, we decided to hear the matter finally. This is particularly in view of the fact that the learned Counsel Mr. Nanavati appearing for the appellant has conceded before us that in view of the evidence of four eye witnesses, it will not be possible for him to challenge the conviction. He, however, wanted us to interfere as far as the sentence imposed upon the appellant by the learned trial judge. In the submission of the learned

Counsel, the sentence of ten years imposed by the learned trial judge is too harsh considering the manner in which the incident had taken place. Learned APP Mr. Patel, however, supported the judgment of the trial court in toto.

7. The prosecution, in order to bring home the charge levelled against the appellant, examined complainant Hayat Fatehkhan, PW 1 Ex.9, Gulmamad, PW2 Ex.10, Fatehkhan Allarkha,PW 3 Ex.11 and Suleman alias Salim, PW 4 Ex.12 who has in fact witnessed the incident. Suleman alias Salim, PW 4 is in fact an injured eye witness.

8. After having gone through the evidence of the said eye witnesses, it is clear that they have remained consistent and involved the accused in the commission of offence. Their presence at the time of the incident cannot be disputed. They are natural eye witnesses as the incident occurred in remote area i.e. outskirt of village Dhonsa Vandh. Merely because they are related to the deceased, their evidence cannot be discarded. After having closely scrutinised the evidence of these eye witnesses, we are of the opinion that there is no infirmity in the evidence. They have stood the test of cross examination. Since the learned Counsel appearing for the appellant does not challenge conviction and has virtually accepted the prosecution case as it is, it is not necessary for us to examine and appreciate the evidence of prosecution witnesses in detail. As per the medical evidence, the cause of death of the deceased has been shown as shock due to rupture of liver. As per the deposition of Dr. Minaben, Ex.13 and from the post-mortem note, it reveals that there was a stab wound in the abdomen of the deceased. It is further reveals that the liver of the deceased was ruptured. The doctor has opined that the cause of death of the deceased was rupture of liver. The doctor has further opined that the injury caused on the dead body was possible by any sharp cutting instrument. She has opined that the stab wound and corresponding internal injuries can be caused by muddamal knife on the dead body. According to the doctor, even if immediate treatment would have been given to the deceased, he would not have survived and, therefore, the injuries caused to the deceased were of such nature that the death would have been the only result.

9. Taking the prosecution case as it is, it clearly emerges that the incident in question took place all of a sudden upon a trivial issue. In a hit of moment, the

appellant inflicted one knife blow on the abdomen of deceased Sharafkhan which proved fatal. He has not acted cruelly as he inflicted only one blow. In the circumstances, the learned trial judge has rightly held that the case squarely falls under Exception (4) of Section 300 of IPC. Hence, we confirm the conviction of the appellant under section 304 Part II of IPC.

10. We have also heard the learned Counsel appearing for the appellant on the question of sentence.

Considering the facts and circumstances of the case, we are of the opinion that the sentence to suffer R.I.for ten years imposed by the learned trial judge is too harsh and, therefore, the same is required to be altered. True, the deceased Sharafkhan, in the instant case, lost his life at the hands of the appellant. However, in absence of any intention to commit murder and since we are convicting the appellant for offence punishable under section 304 Part II of IPC, in our opinion, the ends of justice would be met if we reduce the period of sentence and impose a fine to be paid to the heirs of the deceased.

11. In the result, the following order is passed.

Appeal is partly allowed. The judgment and order of conviction passed by the learned Addl. Sessions Judge, Kachch at Bhuj in Sessions Case No. 52 of 1999 dated 2.8.2001 convicting the appellant for offence punishable under section 304 Part II of the IPC is confirmed and the appellant is ordered to undergo R.I. for three years and to pay a fine of Rs. 25000/-, in default, to undergo further R.I.for two years. The appellant is given four weeks time to deposit the amount of fine before the trial court.

In the event of depositing the amount of fine of Rs. 25000/-, the trial court shall disburse the same to the widow of the deceased Sharafkhan Allarkha and in her absence, to be paid to the heirs of the deceased equally, after proper verification. The appellant shall be given the benefit of set off, of the sentence already undergone. Order accordingly.

(Kshitij R.Vyas,J.)

(Akshay H.Mehta,J.)

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